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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1337

EDWARD DEVINE JOHNSON, *et al.*,

Petitioners,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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EDWARD DEVINE JOHNSON, *et al.*,

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—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia, entered on January 17, 1972, affirming the order of conviction and sentencing entered by the Circuit Court of Rockingham County, Virginia, on July 6, 1970.

Opinion Below

The opinion of the Supreme Court of Virginia is reported at 212 Va. 579 (1972), and is set forth in the Appendix, *infra,* at pp. 1a-11a.

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on January 17, 1972. The jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1257(3).

Questions Presented

1. Whether participants in a concededly peaceful, non-disruptive vigil, conducted in the lobby area of an open campus building, may be convicted of criminal trespass because of a college regulation prohibiting "demonstrations . . . inside any buildings . . . "?

2. Whether a criminal defendant who has been convicted and sentenced in a non-record court may receive a grossly harsher sentence following his appeal and trial *de novo* in a court of record?

Statute Involved

Virginia Code Section 18.1-173 provides in pertinent part as follows:

> Section 18.1-173. *Trespass after having been forbidden to do so.*—If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, . . . after having been forbidden to do so, . . . by the owner, lessee, custodian or other person lawfully in charge thereof, . . . he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not ex-

ceeding twelve months, or by both such fine and imprisonment.

Statement of the Case

The essential facts are not in dispute. They were developed both in the criminal trials below and also in an ancillary federal action seeking injunctive and declaratory relief. *Sword* v. *Fox*, 317 F. Supp. 1055 (W.D. Va. 1970), *rev'd*, 446 F.2d 1091 (4th Cir.), *cert. denied*, —— U.S. ——, 30 L.Ed.2d 547 (1971) (Justices Douglas and Brennan dissenting). They are as follows.

The petitioners are six students and one faculty member at Madison College, a four-year, coeducational state college in Harrisonburg, Virginia. App., *infra*, p. 1a. In April 1970 a controversy developed on the campus concerning the college's decision not to retain certain teachers. 446 F.2d at 1093. On Friday, April 24, 1970 a number of students sought permission to conduct a vigil in Wilson Hall, 48 hours later on Sunday evening (T. 23, TT. 29).* Wilson Hall is a major campus building containing administration and faculty offices, classrooms and an auditorium. It was never locked. (T. 54-55; TT. 10-11). The students' intention was to maintain an overnight vigil in the lobby of Wilson Hall to dramatize their views and then speak with the college president in the morning. 446 F.2d at 1093-94; 317 F. Supp. at 1059.[1]

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* "T. ——" refers to the transcript of the trial in the Rockingham County Court; "TT. ——" refers to the transcript of the trial *de novo* in the Circuit Court of Rockingham County.

[1] The students had attempted a similar vigil on Thursday night, April 23. Following a meeting and rally, held in conformity with college regulations, a group of 25 people proceeded to Wilson Hall

Dean Fox denied permission to hold the vigil on the ground that it would constitute a demonstration inside a building supposedly impermissible under college regulations (T. 5-6, 23-24; TT. 29, 43).[2]

Nevertheless, on Sunday evening, April 26, a group of approximately 50 students and faculty members again assembled in the lobby of Wilson Hall (T. 4-6, 31). School officials and local police arrived at approximately 9:00 P.M. and began locking the building (T. 31, 60, 89; TT. 12-13). At approximately 9:30 P.M. Dean Fox advised the group that they were violating college regulations and were trespassing (T. 7-9; TT. 32-33). He returned shortly after 10:00 P.M. and repeated his warning. Some of the students left, but approximately 25 remained. The Dean began taking their names, which they gave him voluntarily (T. 20-21). The Dean left to obtain arrest warrants for those individuals and returned with State police to have them arrested. Approximately 30 people, including these petitioners, were arrested that night.

There was some testimony that after the building had been locked, one or two of the people inside encouraged some students gathered outside the building to come in

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and assembled there at approximately 11:00 P.M. 446 F.2d at 1093; 317 F. Supp. at 1059. They remained there over an hour, during which time "the passages were kept clear, and there was no boisterousness. Most sat and talked, a few had brought something to read". 317 F. Supp. at 1059. At 12:40 A.M. Dean Fox arrived, informed the group that they were conducting an unregistered demonstration and asked them to leave. Most of the group complied. The Dean returned a while later and the remaining persons also left.

The following morning, the students requested permission for their Sunday night vigil.

[2] Those regulations are set forth in the Appendix, *infra* at pp. 12a-15a.

(T. 79; TT. 15, 20). There was occasional cheering and some of the group inside sang songs. But the testimony of the college officials overwhelmingly demonstrates that the people were quiet and peaceful, cooperative and courteous (T. 14-15, 20-21, 90-91; TT. 22, 43-44). Indeed, the students even swept the floor before leaving. 317 F. Supp. at 1060.

The petitioners and others were charged with violating the state trespass law, *Va. Code Ann.* Section 18.1-173 (1960 repl. vol.).[3]

On May 7, 1970, they were tried in Rockingham County Court. The petitioners pleaded not guilty, maintained that their activity was constitutionally protected and argued that Section 18.1-173 was inapplicable to activity conducted on state owned property. They were found guilty. Before sentencing, County Court Judge Porter Graves, Prosecuting Attorney Jack F. DePoy and Defense Counsel John C. Lowe met to discuss the question of punishment. The parties agreed that in view of the finding of guilty by the court a punishment of a $100 fine with $50 suspended upon condition of good behavior was an appropriate disposition (TT. 116-17, 123-25). Sentences were meted out accordingly for all accused.

The petitioners here appealed to the Circuit Court of Rockingham County, solely to challenge the points of law in question. They waived their rights to a trial by jury in order to allow the Circuit Court judge to decide points of

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[3] In addition to causing the arrests, college officials also took disciplinary action against the students involved. Several of the students brought suit to enjoin those proceedings and declare the campus regulations unconstitutional. District Judge Merhige agreed with the students and granted relief, but his decision was reversed by the Fourth Circuit, which held the regulations to be reasonable. *Sword* v. *Fox, supra.*

law without the complications of a jury. The Court, however, refused to concur in the waiver of trial by jury (TT. 1-2).

Jack F. DePoy prosecuted, as he had earlier at the trial in the court not of record. Petitioners argued only the legal issues, conceding the relevant facts but contending once again that their behavior was constitutionally protected and that the state trespass statute did not apply (TT. 65-77).[4] Petitioners offered no evidence.

Despite the fact that prosecuting attorney DePoy had concurred that the small fines imposed in the court not of record were appropriate in the case when it was heard there, in his summation to the jury in the court of record, he argued that the trespass was "a very serious criminal offense" and should be dealt with appropriately (TT. 93).

The jury found petitioners guilty and imposed much harsher sentences than had been given below, to wit: James McClung, nine months in jail and $1,000 fine, Jay Garland Rainey, six months in jail and $500 fine, Stephen B. Rochelle six months in jail and $500 fine, William Masse $500 fine, Lewis Hazen Sword $500 fine.

Petitioners timely moved to have the sentences remitted to those received in county court, which motion was denied by the Circuit Court (TT. 123-38).

The petitioners then appealed to the Supreme Court of Virginia. Following argument that court held (1) that the state trespass statute was applicable to public property, App., *infra*, pp. 4a-6a, (2) that the petitioners' conduct was not constitutionally protected, relying entirely on the

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[4] As to one of the seven petitioners there was a factual issue concerning whether he had heard the Dean's request to leave.

Fourth Circuit's decision in *Sword* v. *Fox, supra,* and (3) that the severely increased sentence imposed following the petitioners' appeal and trial *de novo* was not a denial of due process, App., *infra,* pp. 8a-11a.

It is to review that decision that petitioners seek a writ of certiorari.

How the Federal Questions Were Raised

The petitioners raised their First Amendment issues by way of motion to the Rockingham County Court and the Circuit Court of Rockingham County, and in the brief to the Supreme Court of Virginia. The enhanced sentencing issue was raised by motion in the Circuit Court of Rockingham County and on appeal to the Supreme Court of Virginia. Both sets of issues were ruled upon by that Court. App., *infra,* pp. 4a-7a, 8a-11a.

REASONS FOR GRANTING THE WRIT

1. The Court should determine whether a general criminal trespass statute can constitutionally be applied to punish peaceful, non-disruptive assembly and protest in a public place where the participants have a right to be.

The broad question posed by this case is the extent to which a general criminal trespass statute can validly be applied to interdict and punish peaceful, non-disruptive First Amendment activity which occurs on a college campus.[5] These petitioners, six students in good standing and

[5] The same Virginia trespass statute was involved in *Lusby* v. *Virginia,* No. 71-525, *cert. denied,* 40 U.S. Law Week 3480 (1972) (Justices Douglas and Stewart dissenting).

one faculty member of Madison College, find themselves in criminal jeopardy because a precise answer to this question has not been forthcoming. In recent years, this Court has ruled upon the validity and application of such statutes on only one occasion, in *Adderly* v. *Florida*, 385 U.S. 39 (1966). The facts here are distinguishable from *Adderly*, and the petitioners submit that their activity was protected under relevant First Amendment principles.

The petitioners engaged in exemplary and courteous assembly and petition. They went "in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where [they had] every right to be . . ." *Brown* v. *Louisiana*, 383 U.S. 131, 141 (1966). The place where they gathered was always open to the college community generally. It was both the object of protest and contained the relevant audience. See *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 319 (1968); *Wolin* v. *Port of New York Authority*, 393 F.2d 83, 89-90 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). And concededly, as in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), there was absolutely no "disorder or disturbance . . . [or] interference, actual or nascent, with the school's work or . . . collision with the rights of other students to be secure and to be let alone". *Id.* at 508. Of course, the mere fact that the activity occurred inside a building can be no basis for withholding First Amendment protection. See *Brown* v. *Louisiana, supra; Unemployed Workers Union* v. *Hackett*, 332 F. Supp. 1372 (D. R.I. 1971) (invalidating a ban on leafleting a state employment office). Thus, had this activity occurred outside the campus, it could not have been criminally punishable.

The sole reason that it was, and the sole cause of Dean Fox's instructions to the petitioners to leave Wilson Hall, was that the college regulation prohibited "demonstrations . . . inside any buildings . . ." The Supreme Court of Virginia, relying on the fact that the Fourth Circuit had held the regulation to be reasonable, rejected the claim that the statute could not constitutionally be applied to the petitioners' conduct. In our certiorari petition in *Sword,* at pp. 9-13, we indicated why the regulation was inconsistent with First Amendment principles. District Judge Merhige agreed, and two Justices of this Court would have granted certiorari to review the Fourth Circuit's contrary conclusion. Certainly where the validity of a regulation is in such doubt, it should not be allowed, without further consideration, to serve as the basis for the imposition of substantial fines and penal confinement. Upholding this regulation for purposes of academic punishment may be one thing, allowing it to justify serious criminal sanction is quite another.

2. This Court should resolve the decisional conflict as to whether a defendant who appeals his conviction from a state non-record court may receive a harsher sentence following a trial *de novo* in a court of record.

The facts of this case clearly raise the important issue of harsher sentence on appeal. The petitioners, the court, and the prosecuting attorney all agreed on an appropriate punishment in the court not of record, given the fact of conviction. Yet, on appeal, when a jury trial was imposed on petitioners by the court, the prosecution asked for and received a harsher penalty, without any attempt to demonstrate intervening factors which might show that a harsher sentence was justified.

The importance of the issue is evidenced by the fact that this Court has previously granted review in order to resolve it. See *North Carolina* v. *Rice,* 40 U.S. Law Week 4073 (1971) *(per curiam) (vacated and remanded on grounds of possible mootness).* The issue is also before the Court in *Colton* v. *Kentucky,* No. 71-404, recently argued, which involves a pattern almost identical to the one here.

North Carolina v. *Pearce,* 395 U.S. 711 (1969) teaches that the Due Process Clause prohibits the state from imposing a harsher sentence as a means of teaching appellants a lesson. The Fourth Circuit, in *Wood* v. *Ross,* 434 F.2d 297 (4th Cir. 1970), *app. sub nom., North Carolina* v. *Rice, supra* and more recently in *Terry* v. *Superintendent of Field Unit No. 9,* 454 F.2d 591 (4th Cir. 1972), has applied this principle to hold that the state may not impose a harsher sentence on an appeal to a court of record unless the record reflects the reasons for doing so. The court below rejected the Fourth Circuit rule in favor of the contrary position reflected in *Lemieux* v. *Robbins,* 414 F.2d 353 (1st Cir. 1969), *cert. denied,* 397 U.S. 1017 (1970).

The situation here reflects the wisdom of the Fourth Circuit rule. Indeed, it is even more aggravated than in *Wood* v. *Ross.* Virginia has provided the trial *de novo* as the only conduit through which one convicted in a non-record court can seek review of a point of statutory or constitutional law by the Virginia Supreme Court. No appeal on the record alone lies in such a case. *Va. Code Ann.* Section 16.1-136 (1960 repl. vol.). The Circuit Court Judge here insisted on a jury trial even though six of the seven petitioners made it clear that they had appealed only to challenge the law. In Virginia, as elsewhere, questions of law

are for the court alone. The only reasonable inference is that the Court anticipated that the jury would deal harshly with the petitioners and insisted on a jury trial as punishment or harassment for taking the appeal. Similarly, the prosecuting attorney, having agreed to nominal fines following the non-record trial, now called for hasher sentences and claimed that the offenses were very serious. Of course, there was no demonstration of any intervening events to justify the harsher sentence.

Perhaps the insistence on a jury trial by itself would not have been error if the court had limited the punishment to that imposed in the lower court; this would have satisfied the reasons and result of *North Carolina* v. *Pearce, supra.* However, the timely motion to remit sentence to that of the lower court was denied by the Circuit Court, thus completing the punitive action against petitioners for taking the appeal.

This Court should review this case simply on the grounds of *Wood* v. *Ross, supra.* The additional factor of clear punitive intent by the judge and prosecutor makes such review imperative.

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

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April 17, 1972

APPENDIX

Decision of the Supreme Court of Virginia

OPINION BY JUSTICE THOMAS C. GORDON, JR.

Richmond, Virginia, January 17, 1972

Present: All the Justices

Record No. 7749

EDWARD DEVINE JOHNSON, JR.

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7750

ROBERT FRANK EVANS

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7751

WILLIAM MASSIE

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7752

JAMES W. MCCLUNG

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7753

JAY GARLAND RAINEY

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7754

STEPHEN B. ROCHELLE

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7755

LEWIS HAZEN SWORD

—v.—

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ROCKINGHAM COUNTY

Hamilton Haas, Judge

On April 24, 1970, a group of students of Madison College, a State institution, applied for permission to hold a "vigil" or protest gathering in Wilson Hall, the administration building of the College. The Dean of Student Services denied the application because the "vigil" qualified as a demonstration under College regulations and the regulations forbade a demonstration in a College building. Nevertheless, students and at least one member of the faculty, including all the defendants in this case, gathered in Wilson Hall on the night of April 26 to hold a "vigil".

College officials requested those in the building, including the defendants, to leave and warned them of the consequences if they did not leave. The defendants and others who did not leave the building were arrested and charged with trespass.[1]

The defendants were tried in the County Court of Rockingham County (a court not of record), convicted and fined $100 each.[2] Upon appeal to the Circuit Court of Rockingham County (a court of record), they were tried by a jury, which found them guilty and fixed sentences as follows:

McClung—9 months in jail and $1,000 fine

Rainey and Rochelle—6 months in jail and $500 fine, each

Johnson, Evans, Massie and Sword—$500 fine, each.

The defendants are now before us on appeal from the orders of the Circuit Court sentencing them in accordance

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[1] Defendants Edward D. Johnson, Robert Evans, William Massie, Jay Garland Rainey, Stephen B. Rochelle and Lewis H. Sword were students, and defendant James McClung was a member of the faculty. Defense counsel contend the evidence does not show that defendant Evans was present when the group was requested to leave the building. We find, however, that the evidence supports the jury's finding that he was present.

The evidence leading to, and the incidents of, the "vigil" on the night of April 26, 1970 are more fully described in the opinion of the Fourth Circuit in *Sword* v. *Fox, infra* n. 2.

[2] Before the defendants were sentenced in the county court, Lewis H. Sword, Stephen B. Rochelle, Jay G. Rainey and certain others filed a complaint in the United States District Court for the Western District of Virginia. They sought a declaratory judgment that the College regulations, under which the application for the "vigil" was denied, were constitutionally invalid as overbroad and vague and as impermissible restraints on freedom of speech and assembly. The District Court granted the relief sought, *Sword* v. *Fox*, 317 F. Supp. 1055 (W.D. Va. 1970); but on appeal the Fourth Circuit reversed, *Sword* v. *Fox*, 446 F.2d 1091 (4th Cir. 1971), *cert. denied*, —— U.S. —— (1971).

with the jury verdict. Four of the points raised by defense counsel merit discussion.

I

Whether the Trespass Statute Applies to Public Property

Defense counsel contend that Code § 18.1-173, the trespass statute under which the defendants were charged, does not apply to Wilson Hall because it is owned by the Commonwealth.[3]

In *Miller* v. *Harless*, 153 Va. 228, 149 S.E. 619 (1929), however, we held that a similar trespass statute, Va. Code Ann. § 3338 (1928), applied to property of a State institution, Virginia Polytechnic Institute. Although the language of Code § 3338 differed from the language of present Code § 18.1-173, we find nothing in the language of the two sections to indicate any distinction respecting their applicability to public as well as private property.[4]

It is true, as pointed out by the Court in the *Miller* case and by defense counsel in this case, that the Board of Visitors of VPI had been granted (among other powers)

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[3] "§ 18.1-173. *Trespass after having been forbidden to do so.*— If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, . . . after having been forbidden to do so . . . by the owner, lessee, custodian or other person lawfully in charge thereof, . . . he shall be deemed guilty of a misdemeanor . . . ".

" • • • "

Va. Code Ann. § 18.1-173 (1960).

[4] Code § 3338, which was applicable in *Miller* v. *Harless, supra,* proscribed first the unauthorized hunting on property "of another". The section then provided that "if any person after being warned not to do so by the owner, or his agent, shall go upon the property of the said owner, he shall . . . be deemed guilty of a misdemeanor . . . ". Va. Code Ann. § 3338 (1928).

the power "to prohibit entrance to said property [property of VPI] of undesirable and disorderly persons, or to eject said persons from said property, and to prosecute under the laws of the State trespassers and persons committing offenses on said property." Va. Code Ann. § 864 (1924). But in holding Code § 3338 applicable to a trespass upon VPI property, the Court necessarily held that section applicable to publicly owned property. Otherwise, a trespasser upon VPI property could not have been prosecuted under § 3338, whether at the instance of the Board of Visitors or anyone else. So we agree with the Attorney General that the *Miller* case is direct and controlling authority against defense counsel's position in this case.

Defense counsel rely principally upon the following statement in *Hall* v. *Commonwealth*, 188 Va. 72, 77, 49 S.E.2d 369, 371 (1948), involving a prosecution of Jehovah's Witnesses for trespass while engaged in distributing religious tracts:

> "The only purpose of this law [the trespass law now codified as § 18.1-173] is to protect the rights of the owners or those in lawful control of private property".

But that statement was made in the context of a controversy whether the trespass statute could be applied, consistently with First and Fourteenth Amendment guarantees, to the use of passageways in a privately-owned apartment building. The *Hall* case did not involve the applicability of the trespass statute to property owned by the Commonwealth.

The statement in *Hall* v. *Commonwealth, supra,* was repeated in *Price* v. *Commonwealth*, 209 Va. 383, 387, 164 S.E.2d 676, 679 (1968). Nevertheless, the Court in *Price*

decided merely that a trespass statute (Code § 18.1-365, the language of which is similar to Code § 18.1-173) did not apply to a public street. The holding in *Price* is consistent with *Miller* v. *Harless, supra,* which expressly recognized that the trespass statute there involved did not apply to walkways and driveways on the VPI campus.

Despite the dictum in *Hall* v. *Commonwealth, supra,* and its repetition in *Price* v. *Commonwealth, supra,* our decisions in those cases are not inconsistent with our decision in *Miller* v. *Harless, supra.* Before our decision today, *Miller* stood for the proposition that a trespass statute like Code § 18.1-173 applies to publicly owned property other than thoroughfares. We now reaffirm that proposition.

II

Whether the Defendants Had a Constitutional Right to Be and Remain in Wilson Hall on the Night of April 26, 1970

Defense counsel contend that since the First Amendment guarantees the defendants the right of protest they were exercising in Wilson Hall on the night of April 26, 1970, they cannot be convicted of trespass for being and remaining there that night.

The record before us supports the finding made by the Fourth Circuit in *Sword* v. *Fox, supra,* n. 2: "What was denied these students—and all that was denied them—was the right to demonstrate by a 'sit-in' *specifically in Wilson Hall.* It is thus not the *right* to protest but the *place* of protest that was regulated and is involved in this appeal." 446 F.2d at 1095.

For the reasons set forth in the opinion of the Fourth Circuit in *Sword* v. *Fox, supra,* we hold that the defen-

dants had no constitutional right to be and remain in Wilson Hall on the night of April 26, 1970.

III

Whether the Trial Judge Improperly Commented on the Defendants' Failure to Testify

In his closing argument, defense counsel remarked "that these students were there [in Wilson Hall] in good faith, they were there sincerely and conscientiously". The Commonwealth's Attorney objected on the ground that the evidence did not support the remark.

When defense counsel expressed "shock" at the objection of the Commonwealth's Attorney, the court stated: "What I think Mr. DePoy [the Commonwealth's Attorney] meant was that there has been no explanation by any of the defendants as to what really transpired or why they did this or anything else." Defense counsel immediately moved for a mistrial on the ground that the court had commented on the failure of the defendants to take the stand.

The court denied the motion for a mistrial, after advising the jury:

> "The court charges the jury and tells the jury that an accused person does not have to take the stand, that he is at liberty to remain off the witness stand if he wishes. He does not have to testify and his failure to testify cannot be considered by the jury in any way as prejudicial to him or creating any inference of his guilt or his involvement. It is a privilege that any accused person has and I think the dialogue between the objecting prosecutor and the defense counsel gave rise to the court's utterance, and was justified."

Defense counsel assigns error to the court's failure to grant a mistrial.

We find no error. Defense counsel's remarks gave reason for the court's remark. And the court correctly and fully advised the jury respecting the defendants' right to remain silent.

IV

Whether the Increased Sentence Imposed in the Court of Record Violated Due Process

Defense counsel contend that the Circuit Court of Rockingham County unconstitutionally sanctioned a more severe sentence than that imposed by the County Court. Despite our holding in *Evans* v. *Richmond,* 210 Va. 403, 171 S.E.2d 247 (1969), that a more severe sentence is not constitutionally impermissible under these circumstances, counsel attack the increased sentence because of its "chilling" effect on the defendants' right of appeal to the circuit court.

In *Wood* v. *Ross,* 434 F.2d 297 (4th Cir. 1970), the court reached the opposite conclusion from *Evans.*[5] The Fourth Circuit in that case expressed its disagreement not only with *Evans* but also with the First Circuit's decision in *Lemieux* v. *Robbins,* 414 F.2d 353 (1st Cir. 1969), which reached the same conclusion as *Evans.* We will now reexamine *Evans.*[6]

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[5] The Supreme Court granted certiorari to review the judgment in *North Carolina* v. *Rice,* 434 F.2d 297 (4th Cir. 1970), a companion case in which the Fourth Circuit reached the same conclusion as in *Wood* v. *Ross, supra.* 401 U.S. 1008. On December 14, 1971, the Supreme Court vacated the judgment of the Fourth Circuit in *Rice* and remanded the case for reconsideration of the question of mootness, without reaching the question we are now considering. *North Carolina* v. *Rice,* —— U.S. —— (1971).

[6] We cannot ignore a practical consideration, the power of federal courts to grant habeas corpus if they disagree with our interpreta-

We are of course bound by *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), to the extent that it is applicable here. *Pearce* tell us that:-

> "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

Id. at 725.

Pearce was convicted of a felony and sentenced by a trial judge to imprisonment for twelve to fifteen years. In a post conviction proceeding, he secured a reversal of his conviction on the ground that an involuntary confession had been admitted in evidence against him. Pearce was retried, convicted and sentenced by the trial judge to a longer prison term than originally imposed.[7] The Supreme Court held that the increased punishment violated due process.

Vindictiveness in the imposition of sentence, against which *Pearce* levels its main thrust, is lacking in the cases now before us. The jury, which fixed the defendants' sen-

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tion of the Constitution of the United States. At the same time, we cannot abdicate for reasons of expediency our function of deciding questions properly before us involving the Constitution of the United States, in the light of decisions of the Supreme Court and subject to correction by that Court.

[7] At the second trial, Pearce was "sentenced by the trial judge to an eight-year prison term, which, when added to the time Pearce had already spent in prison, the parties agree amounted to a longer total sentence than that originally imposed". *North Carolina* v. *Pearce, supra* at 713.

tences in the circuit court, cannot be deemed to have increased the sentences imposed in the county court to punish the defendants for exercising their right to appeal. To assume that the jurors even knew of the sentences imposed by the county court would assume they had information not rightfully theirs.

There are yet other differences between Pearce's case and these cases.

In Pearce's case, the right to a new trial was predicated and dependent on error in the first trial. And, in the words of the First Circuit, the "very proof of error [gave] the state the opportunity to increase the punishment." *Lemieux* v. *Robbins, supra* at 355.

In these cases, the defendants' appeal to the circuit court was not predicated or dependent on error in the trial in the county court. In fact, their appeal to the circuit court was not an appeal in the usual sense of the word. Rather, the defendants' "appeal" was an exercise of the unqualified right to a trial de novo, which gave them a second full opportunity for acquittal.

To view the Virginia procedure as forcing an accused to lose the "benefit" of the county court sentence and as "chilling" his right to appeal begs the point. The State could constitutionally afford an accused the right to only one original trial. One trial in the circuit court would satisfy all constitutional guarantees.

Instead, the State gives an accused the benefit of two full opportunities for acquittal in the long run interest of speedy trial in the county court and reducing the load of the circuit court. If an accused elects to take advantage of a second and fresh opportunity, it appears entirely fair that the accused and the State should start again at parity, as contemplated under the Virginia procedure.

Pearce, even if it should be applied full force to an "appeal" to a circuit court, does not mean that no "chilling effect" can ever be attached to an appeal. Instead, *Pearce* lays down a rule of reasonableness. See *Lemieux* v. *Robbins, supra* at 355. And the Virginia procedure, as applied to the defendants in this case, supports a legitimate state interest and is fair and reasonable.

In short, we agree with what the First Circuit said in *Lemieux* v. *Robbins, supra,* much of which we have repeated. See also *State* v. *Spencer,* 276 N.C. 535, 173 S.E.2d 765 (1970); *State* v. *Sparrow,* 276 N.C. 499, 173 S.E.2d 897 (1970). Accordingly, we adhere to *Evans* v. *Richmond, supra.*

Affirmed.

Madison College Regulations

Regulations on Demonstrations and Peaceful Assembly

Madison College seeks to preserve and to encourage the exercise of the rights of expression, conscience, affiliation, and peaceful assemblage. The College is equally mindful that a reasonable and lawful scheduling and assignment of College facilities, resources, and personnel consistent with the civil liberties expressed in the first amendment of the United State Constitution, are necessary in order to assure the pursuit of educational programs, to accommodate the needs of all persons, and to respect the rights of all members of the College Community.

The orderly conduct of classes is basic to the primary purpose of the College. Demonstration procedures are established to guarantee the continuation of this function and the continued health and safety of the members of the campus community. The College neither permits nor forbids demonstrations off campus by students or student organizations. The students or student organizations demonstrating off campus are reminded that they are expected to act in a manner that will conform to all national, state, and municipal laws and ordinances. The College is particularly concerned that this responsibility be fulfilled when students or student organizations demonstrating off campus identify themselves as students of Madison College.

A demonstration is considered to be a public manifestation of welcome, approval, protest, or condemnation as by a mass meeting, procession, picketing, or occupation of premises. (Exhibitions commonly associated with social or athletic activities are not within the purview of this policy and its supporting regulations.)

In order to achieve all purposes above, to provide regulations in the event of demonstrations on campus by students or student organizations, and to assure the administration of this policy consistent with all the purposes expressed above, the following procedures are established:

1. The demonstration is to be registered with the Office of Student Activities 48 hours in advance.
2. At the time of registration, the student is advised regarding reasonable demonstration activities.
3. Demonstrations are not to block traffic.
4. Demonstrations are forbidden in the areas of the Health Center, inside any buildings and congregating in the locations of fire hydrants. The appropriate areas for demonstrations will be determined at the time of the request.
5. The number of pickets may be limited by reasonable consideration of space in the proposed demonstration areas. Students are to be informed of this at the time of registration.
6. The right of expression is not to be confused with license to incite violence or to use indecent language, because these are beyond legal and reasonable espousal of any cause for which demonstrations are conducted.
7. If disturbance from observers begins to develop, the demonstrators are expected to refrain from altercations with observers.
8. Observers are expected to maintain a reasonable distance between themselves and the demonstrators at all times.

9. Observers may not obstruct legitimate demonstrations by physically blocking the path, by blocking other observers, throwing objects, or in any way acting to limit the right of free expression.

10. Both demonstrators and observers are expected to follow the directions of the Campus Police.

The Director of Student Activities shall submit to the Dean of Student Services a summary of the advice given the applicants for demonstrators, and inform the Chief of the Campus Security Force of the proposed demonstration.

The Dean of Student Services assigns one or more of the members of his staff to observe the demonstration. A complete report is made by the observing representative on the following day. This is kept on file.

In the event that an assembly appears to be a demonstration related to grievances, those present should be advised that orderly procedures for the hearing of grievances are available and must be adhered to. Such procedures include: the "open door" policy of the President of the College, the Provost and Assistant Provost of the College, the Business Manager, the Dean of Student Services, and his administrative staff, as well as the open meetings with students held monthly by the President and Administrative Council of the College. College officials will not negotiate with groups under conditions of duress, such as unauthorized occupation of College property.

Penalties

Students of the College are expected to conduct themselves as ladies and gentlemen both within the College and elsewhere. For student conduct which is outside the jurisdiction of the College but which tends to discredit or injure

the College, the President is authorized by the Board of Visitors to impose such penalty as he may deem appropriate, including expulsion from the College. This responsibility is implemented by the Faculty Judiciary Committee, subject to review by the President.

Any student found guilty of participating in or inciting a riot or an unauthorized or disorderly assembly is subject to suspension.

When an assembly of students not authorized by the Dean of Student Services, the Dean of Men, or the Deans of Women has been requested to disband by the President or by an officer of the Student Government Organization or Student Government Association, or by a dean or other administrative officer, those students refusing to comply will be subject to immediate suspension.

Appeals

Any student or student organization convinced in good faith that arbitrary, unlawful, or unreasonable limitations have been imposed upon any demonstration or proposed demonstration, or any student or student organization subjected to disciplinary action under the provisions of this policy may appeal to the Faculty Judiciary Committee.